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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 536

LOUIS COMPAGNA AND CHARLES GIOE, PETITIONERS

v.

WILLIAM H. HIATT, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings of fact and conclusions of law of the District Court (R. 391-402) and its opinion and order denying motions for reconsideration of its judgments (R. 408-409) are reported at 82 F. Supp. 295. The majority (R. 437-445) and dissenting (R. 445-446) opinions in the Court of Appeals and that court's *per curiam* opinion and order denying a petition for rehearing (R. 452) are reported at 178 F. 2d 42.

JURISDICTION

The judgment of the Court of Appeals was entered on November 10, 1949 (R. 447) and a petition for rehearing was denied on December 16, 1949 (R. 452). The petition for a writ of certiorari was filed on January 12, 1950. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTION PRESENTED

Whether a prisoner held under a judgment of conviction, following his arrest as a parole violator and the revocation of his parole, is required to show, as a condition of his discharge on habeas corpus, that the order revoking parole is null and void, or whether it is sufficient that the court find that the warrant under which he was arrested as a parole violator was issued by the Board of Parole without information of parole violation.

STATUTES INVOLVED

At the time of the issuance of the parole-violation warrants here involved (July 21, 1948), the pertinent provisions of the parole laws were as follows:

> 18 U. S. C. [1946 ed.] 714. *Parole of prisoners; conditions.*
>
> Every prisoner who has been or may hereafter be convicted of any offense against the United States and is confined in execution of the judgment of such conviction in any United States penitentiary or prison, for a definite term or terms of over one year, or for the term of his natural life, whose record of conduct

shows that he has observed the rules of such institution, and who, if sentenced for a definite term, has served one-third of the total of such term or terms for which he was sentenced, or, if sentenced for the term of his natural life, has served not less than fifteen years, may be released on parole as hereinafter provided. (Act of June 25, 1910, c. 387, § 1, 36 Stat. 819, as amended by the Act of January 23, 1913, c. 9, 37 Stat. 650.)

18 U. S. C. [1946 ed.] 716. *Same; granting of parole; application; findings; terms and conditions;* * * *.

If it shall appear to the Board of Parole * * * that there is a reasonable probability that such applicant [for parole] will live and remain at liberty without violating the laws, and if in the opinion of the board such release is not incompatible with the welfare of society, then the Board of Parole may in its discretion authorize the release of such applicant on parole, and he shall be allowed to go on parole outside of said prison, and, in the discretion of the board, to return to his home, upon such terms and conditions, including personal reports from such paroled person, as said Board of Parole shall prescribe, and to remain, while on parole, in the legal custody and under the control of the warden of such prison from which paroled, and until the expiration of the term or terms specified in his sentence * * *. (Act of June 25, 1910, c. 387, § 3, 36 Stat. 819, as amended by the Act of May 13, 1930, c. 255, § 1, 46 Stat. 272.)

18 U. S. C. [1946 ed.] 717. *Same; violation of parole; warrant for retaking prisoner.*

If [the warden of the prison or penitentiary from which said prisoner was paroled or][1] the Board of Parole or any member thereof shall have reliable information that the prisoner has violated his parole, then said [warden][2] at any time within the term or

---

[1] The bracketed words have been obsolete since May 13, 1930. They have been erroneously retained in successive editions of the United States Code published since that date, to and including the 1946 edition. See footnote 2, *infra*, for an explanation of the origin of the error.

[2] The bracketed word "warden" has been obsolete since May 13, 1930. It should read "board or any member thereof." This error has been repeated in all editions of the United States Code published since that date, to and including the 1946 edition.

This and the error referred to in the preceding footnote are explained as follows:

Section 2 of the Act of June 25, 1910, c. 387, 36 Stat. 819 (this Act being the basic legislation establishing the federal parole system), provided for a separate "board of parole" for each federal penitentiary, consisting of the warden and the physician of the penitentiary and the "superintendent of prisons of the Department of Justice"—the latter official being thus a common member of all boards of parole. Section 4 of the Act (36 Stat. 820) was cast in language virtually identical with the language of above-quoted 18 U.S.C. [1946 ed.] 717.

The Act of May 13, 1930, c. 255, 46 Stat. 272, introduced substantive changes in the parole laws. The three sections of this Act (a fourth section merely designated the effective date of the Act) were inserted in all editions of the United States Code thereafter published, to and including the 1946 edition, as 18 U.S.C. 723a, 723b, and 723c, respectively. The first section of the 1930 Act (18 U.S.C. [1946 ed.] 723a) created, "in lieu of all existing boards of parole at Federal penal and correctional institutions," "a single Board of Parole to consist of three members to be appointed by the Attorney General." This amendment of the basic law was subsequently reflected in the various Code sections relating to parole, including that now under consideration. The third section of the 1930 Act (18 U.S.C. [1946 ed.] 723c) provided that the newly-created "board, or any member thereof, shall hereafter

terms of the prisoner's sentence, may issue his warrant to any officer hereinafter authorized to execute the same for the retaking of such prisoner. (Act of June 25, 1910, c. 387, § 4, 36 Stat. 820, as amended by the Act of May 13, 1930, c. 255, § 1, 46 Stat. 272.)

18 U. S. C. [1946 ed.] 719. *Same; action by board on issue of warrant; revocation of parole.*

When a prisoner has been retaken upon a warrant issued by the Board of Parole, he shall be given an opportunity to appear before said Board of Parole, a member thereof, or an examiner designated by the Board. The said Board may then, or at any time in its discretion, revoke the order and terminate such parole or modify the terms and conditions thereof. If such order of parole shall be re-

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have the *exclusive authority* to issue warrants for the retaking of any United States prisoner who has violated his parole. * * *" [emphasis supplied]. (See p. 6, *infra*, where this section is set out in the text.) Though it is clear that this provision introduced a substantive change in the law as contained in § 4 of the basic 1910 Act, the compilers of the successive editions of the Code thereafter published evidently overlooked the desirability of rewording the Code section (Title 18, § 717, quoted in text, *supra*) corresponding to said § 4, so as to indicate the change. By omitting the first bracketed matter in 18 U.S.C. [1946 ed.] 717, and by substituting "board or any member thereof" for "warden," the 1930 amendment is fully reflected in the Code section.

Section 4205 of new title 18 (effective September 1, 1948) consolidates §§ 717 and 723c of that title of previous editions of the Code and eliminates the obsolete features of § 717 (see Reviser's Note). It provides in pertinent part:

"A warrant for the retaking of any United States prisoner who has violated his parole, may be issued only by the Board of Parole or a member thereof and within the maximum term or terms for which he was sentenced. * * *"

voked and the parole so terminated, the said prisoner shall serve the remainder of the sentence originally imposed; * * *. (Act of June 25, 1910, c. 387, § 6, 36 Stat. 820, as amended by the Act of May 13, 1930, c. 255, § 1, 46 Stat. 272, and the Act of June 29, 1940, c. 449, § 3, 54 Stat. 692.)

18 U. S. C. [1946 ed.] 723c. *Same; violation of parole; warrant for retaking prisoner;* * * *.

The Board of Parole created by section 723a of this title,[3] or any member thereof, shall hereafter have the exclusive authority to issue warrants for the retaking of any United States prisoner who has violated his parole. * * * (Act of May 13, 1930, c. 255, § 3, 46 Stat. 272.)

STATEMENT

Petitioners are two of a group of defendants who were convicted in 1943, in the District Court for the Southern District of New York, of violating the federal Anti-Racketeering Act of 1934 (18 U. S. C. [1940 ed.] 420a) by conspiring to extort upwards of $1,000,000 from the motion picture industry (R. 61-64, 87). Each petitioner was sentenced to ten years' imprisonment and to pay a fine of $10,000 (R. 73-74). Their convictions were affirmed by the Court of Appeals for the Second Circuit, *United States* v. *Compagna*, 146 F. 2d 524, and this Court denied petitions for writs of certiorari, 324 U. S. 867.

[3] Section 723a, based on § 1 of the Act of May 13, 1930, c. 255, 46 Stat. 272, created a single Board of Parole for all penitentiaries in lieu of the several boards of parole previously existing. See footnote 2, *supra*, pp. 4-5.

On August 13, 1947, having served in excess of one-third of their prison sentences (see 18 U. S. C. [1946 ed.] 714, *supra*, pp. 2-3), petitioners were released from Leavenworth Penitentiary on parole (R. 52, 59). The paroling of petitioners (and of several of their convicted codefendants) was followed by unfavorable newspaper publicity in Chicago, and a subcommittee of the House Committee on Expenditures in the Executive Departments was appointed to investigate the operations of the Board of Parole and of these parolees' cases in particular (see p. 1 of H. Rep. 2441, 80th Cong., 2d sess., entitled "Investigation as to the Manner in which the United States Board of Parole is Operating, &c."). Extensive hearings were held by this subcommittee in Chicago and Washington beginning in September 1947 and continuing to June 1948 (*id.*, title page, and p. 2). The printed transcript of the hearings held up to March 11, 1948, was received in evidence in the habeas corpus proceeding here involved (see R. 276, 421) and is on file as an original exhibit in this Court. The transcript of these hearings indicates that members of the Board of Parole testified before the subcommittee that the Board was unaware of any instances of parole violation by petitioners up to the dates of their testifying.[4]

[4] Board member Fred Rogers, testifying on March 3, 1948, stated (Hearings, p. 573): "These men [petitioners and two of their convicted codefendants who had also been granted paroles] have been out for 6 months, and there has not been a single report of an infraction of a rule of society against

On July 21, 1948, Board member Rogers issued warrants (R. 57-58 [Compagna]; Gioe's omitted) for the arrest of petitioners as parole violators (see 18 U. S. C. [1946 ed.] 717, 723c, *supra*, pp. 4-5, 6), each warrant reciting, *inter alia*, that "reliable information" had been presented to the signer of the warrant that the parolee had "violated the conditions of his parole" (R. 57). The specific respects in which each petitioner had allegedly violated the terms of his parole were set forth in a document entitled "Referral for Consideration of Alleged Violation," bearing the same date as the warrant and addressed to the Board of Parole (R. 52, 59).[5] Petitioners were arrested pursuant to the warrants and were committed to Atlanta Penitentiary on July 23, 1948 (R. 30, 50, 51).

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them. • • • [N]ot one report [of parole violation] has been received by the Board of Parole."

Board member Boleslau Monkiewicz, testifying on March 9, 1948, gave like testimony (*id.*, p. 713).

[5] Compagna's "referral" listed the following charges against him (R. 59):

"1. Failure to reveal source of monies used in Settlement of Internal Revenue tax, when questioned before a legally constituted body.

"2. Failure to conduct himself honorably.

"3. Failure to truthfully disclose associates on flight from Kansas City to Chicago following release from Leavenworth."

Gioe's "referral" charged him with (R. 52):

"1. Change of employment without permission.

"2. Failure to truthfully disclose associates on flight from Kansas City to Chicago following release from Leavenworth.

"3. Association with persons of bad reputation.

"4. Failure to conduct himself honorably.

"5. Failure to give a proper accounting of income and expenditures."

On September 2, 1948, the present proceedings were instituted by the filing of petitions for writs of habeas corpus (R. 1-29, 32-37) on petitioners' behalf in the District Court for the Northern District of Georgia. The legality of petitioners' detention was challenged on the following two main grounds:[6] (1) The warrants for petitioners' arrest as parole violators were issued, it was alleged, without "reliable information" of violation (R. 1-11, 32-36); and (2) their original convictions were void because the prosecution, allegedly, knowingly used perjured testimony against them, and because the trial court lacked jurisdiction for the alleged reason that the conspiracy charged was not formed in New York (R. 11-19, 36-37). In connection with the first of these grounds, each petition further stated (R. 26, 35) that—

> The Parole Board has set September 8, 1948 as a tentative date for a hearing in prison and on this September 2, 1948 for the first time has notified your petitioner of the nature of the charges to be made as a basis for revocation [of parole] as follows:

This was followed by a listing of the specific charges of parole violation, as contained in the "referral" applicable to each (see footnote 5, *supra,* p. 8), and by general denials of the truth of such charges (R. 26-27, 35-36).

[6] Gioe's petition (R. 32-37) was less detailed than Compagna's lengthier petition (R. 1-29), but it in effect incorporated the latter by reference insofar as it was "applicable to [his] case" (R. 36).

Among the prayers for relief made by each petitioner was the request (R. 24; see R. 36) that "the Parole Board be ordered to grant your petitioner a hearing in compliance with the requirements of the Administrative Procedure Act [of June 11, 1946 (5 U. S. C. 1001-1011)]."

On September 20, 1948, pursuant to an order to show cause why the prayed-for writs should not issue (R. 38), respondent filed a response (R. 39-49) justifying his detention of petitioners on the basis of the original conviction and sentence of each (R. 39-41), and the issuance of the parole-violation warrants and the "referrals" listing the specifications of such violations (R. 39). Attached to the response as exhibits were the records of each petitioner's original conviction, sentence, commitment, etc. (R. 50-51, 54-56, 60-98), the parole-violation warrants (R. 57-58), and the "referrals" (R. 52, 59). The response further stated that, following his arrest as a parole violator, each petitioner (R. 42)—

> * * * was given a hearing in the regular routine course of business by the United States Board of Parole, by a majority number of the Board, in the United States Penitentiary in Atlanta, Georgia on September 8, 1948, and the Board will consider whether or not petitioner has actually violated his parole, and in due course an order will be entered, either holding that he has violated his parole or that he has not, in which latter event he will of

> course be released. However, such a decision has not been reached at [this] time * * *.

Accordingly, the response stated (R. 43; see also R. 47),—

> Petitioner has not * * * exhausted his administrative remedy, and this habeas corpus proceeding is premature * * *.

The response further denied the applicability of the Administrative Procedure Act to any phase of the activities of the Board of Parole (R. 43-47, 48-49).[7]

On September 27, 1948, each petitioner (see R. 31) filed an amendment of his petition (R. 30-31) alleging that the hearing accorded him on September 8, 1948, by two members of the Board of Parole was not such a hearing as is contemplated by the Administrative Procedure Act. Specifically, the amendment alleged (R. 30),—

> * * * Your petitioner was cross-examined concerning the charges herein referred to [*i.e.*, in the original petition; see p. 9, *supra*] and your petitioner repeated denial to said charges. A court reporter took notes. Your petitioner

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[7] The response also denied the propriety of an inquiry by a habeas corpus court into alleged use of perjury at a criminal trial (R. 41-42). As respondent later pointed out in an amendment of the response (see p. 13, *infra*), a charge that perjury was knowingly used by the prosecution to obtain a conviction must, since September 1, 1948, when § 2255 of new title 28 of the United States Code became effective, be made in the first instance in the court of conviction by motion to vacate the sentence.

> maintained and stated to the members of the Board that no violation of parole had occurred. The matter was continued generally and referred to Washington. No evidence other than that of your petitioner was introduced. Although specifically requested of the members of the Board on September 8, 1948, your petitioner was denied the right of counsel and all other necessary incidents of a proper hearing.

In a traverse to the response (R. 102-104), filed at about the same time as the amendment of the petition, each petitioner alleged (R. 103):

> 79. * * * Respondent has failed to meet the real issue and appears to take the position that the judgment is valid and the warrant good, regardless of the facts. We find no denial in the Response to the effect that perjury was used as alleged, or that the New York Court had no jurisdiction because of lack of venue. Nor do we find any denial in the Response that the warrant was arbitrarily issued in the absence of evidence.
>
> * * * * *
>
> 82. The Response alleges that final Administrative action has not been taken. Petitioner states the fact to be that the so-called warrant is a commitment and as such is final.

On September 27, 1948, following a hearing on the above pleadings (R. 106-166), writs of habeas corpus were granted, returnable on October 25, 1948 (R. 105).

On the latter date a hearing on the writs was held (R. 167-338) at which both petitioners testified (R. 169-197, 205-235). At the commencement of the hearing (see R. 168), respondent filed an amendment of his response to the show-cause order (R. 99-100), stating (R. 99):

> (a) That he is without knowledge whether perjury was committed in the conviction of the petitioner herein, or whether the Court for the Southern District of New York lacked venue, but that these are matters which might be raised by appropriate motion before the said trial court pursuant to the last paragraph of Section 2255, Title 28, U. S. C., as amended, effective September 1, 1948.
>
> (b) That he is without personal knowledge whether the warrant issued by the United States Board of Parole, under which petition [sic] was taken into custody, was issued capriciously and without reliable information, as alleged by the petitioner, but that the recitation in the warrant that it was issued upon reliable information creates a presumption of regularity and legality.

Petitioners testified at the hearing that the hearings accorded them by the Board of Parole in the penitentiary consisted merely of their being questioned by the two Board members present relative to the charges contained in the referrals, and that they were refused permission to be represented by counsel at the hearings and to produce witnesses in

their behalf (R. 178-180, 189-190, 209-210). The Government moved to strike all such testimony (R. 201-202), but the motion was denied (R. 202-204). Petitioners were also permitted to testify, over the repeated objections of the Government (R. 176, 181, 186, 201-202, 212, 215, 225), that the charges of parole violation, as contained in the referrals, were not true (R. 175-186, 210-222). The objections to both these lines of testimony were based on the asserted ground that it was the exclusive function of the Board of Parole to determine whether violations of parole had occurred, and that, pending decision by the Board as to whether there had been violations and whether the paroles should be revoked, petitioners' assertions in a habeas corpus proceeding that they had not violated their paroles and had not received fair hearings were irrelevant because premature (see, especially, R. 201-202).

Also received in evidence at the hearing on the writs, on petitioners' behalf, was a deposition by Board member Monkiewicz in the form of answers (R. 355-363) to certain written interrogatories (R. 372-374). The only interrogatories here relevant were as follows (R. 372-373):

> 52. Is the testimony given by you correctly reported in the printed copy of the volume entitled, "Hearings Before a Subcommittee of the Committee on Expenditures in the Executive Departments House of Representatives

> Eightieth Congress Second Session."? Would you make the same answers here if the same questions were here put to you?
>
> 53. In the warrant signed by Judge Rogers, Judge Rogers recites that reliable information has been presented to him of a violation. Will you please state what the information was as to each case? When it reached you? Its source, and your reasons, if any, for believing it to be reliable?

Mr. Monkiewicz's answer to the first part of question No. 52 was "Yes,"[8] but he "decline[d] to answer the second part" of that question, or any part of question No. 53, on the ground that those questions "relate to a matter now pending before the Board of Parole" (R. 355).[9]

At the argument (R. 273-338) concluding the above hearing, counsel for petitioners contended that it had been established at the hearing that the Board of Parole issued the warrants of parole violation in the absence of reliable information of violation and that consequently the warrants were invalid and petitioners' detention illegal (R. 281, 285-286, 295). Government counsel renewed and amplified the Government's argument that the habeas corpus proceeding was premature because

[8] For the asserted relevance of this reply, see p. 7, *supra*, and footnote 4.

[9] Identical interrogatories were propounded to Board Chairman George Killinger (R. 370), who succeeded former Chairman Daniel Lyons during the pendency of the subcommittee hearings (see H. Rep. 2411, 80th Cong., 2d sess., p. 2), and identical answers were made (R. 346).

petitioners had not yet exhausted their administrative remedies. Since, it was urged, the Board of Parole had under advisement, following the hearings held in the penitentiary, the matter of whether petitioners' paroles should be revoked, and since the Board might finally determine that there had been no violations and thus effect petitioners' release within the framework of the administrative process, it was premature for a court to inquire into the legality of the detention in a habeas corpus proceeding (R. 308, 310-312, 314, 319, 326-327). In reply to the court's query as to what "information" the Board had to support the charges of parole violation contained in the warrants and the accompanying referrals (R. 330), counsel for the Government insisted that inquiry into this matter was premature for the above-stated reasons and announced their intention of "stand-[ing] on the proposition of law" (R. 329, 330-334).

On December 4, 1948, the District Court (Underwood, D. J.) made "findings of fact and conclusions of law" (R. 391-402) and entered an order (R. 403) sustaining the writs and directing petitioners' discharge from custody. The court held that under 18 U. S. C. [1946 ed.] 717, *supra*, pp. 4-5, an "express condition precedent to the issuance of a Parole Violator Warrant is that the issuing authority 'have reliable information that the prisoner has violated his parole.' This is in the nature of a jurisdictional requirement and may be inquired

into by competent authority" (R. 393); and that, while "[t]here is a presumption of the legality of the warrant, * * * it is not a conclusive presumption and it has been overcome by the evidence in the case" (R. 396). Judge Underwood made it clear that he did not conceive it his function to inquire into the reliability of the information on which the Board of Parole acted in issuing the warrants, but merely to determine whether the Board acted on any "substantial information," reliable or otherwise (R. 393-394, 398).[10]

In order to afford respondent an opportunity to appeal, and to enable the Board of Parole to issue new warrants based on reliable information of parole violation subsequently acquired, petitioners' discharge was ordered delayed for 15 days from the entry of the order sustaining the writs (R. 403).

On December 17, 1948, within this 15-day period, the Government filed in the District Court "motion[s] to reconsider" its judgment (R. 404-405) on the ground that on December 16th the Board of Parole had "taken action by revoking the parole[s]," with the consequence that respondent "now holds the said [petitioners] in custody upon the basis of the official revocation of parole[s]."

---

[10] Judge Underwood held that petitioners' contentions that their original convictions were void were "without merit" (R. 392-393), and found it "not necessary to consider the other grounds of the petitions for writ of habeas corpus" (R 402).

Copies of the "certificate[s] of revocation" were attached to the motions (R. 406 [Compagna]; Gioe's omitted). Pursuant to a show-cause order (R. 407), a hearing on the motions was set for December 20, 1948. On the latter date, "Counsel advised the Court that they did not desire to present further evidence or argument" (R. 408), and the motions were denied (R. 409). The court observed in a short opinion (R. 408-409) that—

> These motions request reconsideration of the judgments for the sole reason that the Parole Board has now revoked the paroles, such action having been taken on December 16, 1948.
>
> On what grounds or on what evidence, if any, other than the mere revocations, is not shown, but the Court and petitioners are still left in the darkness which shrouded the habeas corpus trials in which the members of the Board declined to even state what violations of the parole were charged [11] and indicated that no hearings would be granted petitioner other than the "appearances" they had had before the Board. These "appearances" fall far short of the fair hearing which the law contemplates.

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[11] Judge Underwood's statement that "the members of the Board declined to even state what violations of the parole were charged" is inaccurate and misleading, as pointed out by the Court of Appeals (R. 442). Petitioners were well aware of the nature of the alleged violations at least as early as September 2, 1948, when they filed their petitions for habeas corpus (see p. 9, *supra*). It is probable that what Judge Underwood meant was that the members of the Board declined to state on what information the charges were based.

> If the motions were granted, there is no reason to suppose that upon reconsideration the Court would be met with anything but silence similar to that encountered at the hearings already had and nothing would be gained.
>
> The revocations of parole were based on illegal Parole Violator Warrants and were issued without fair hearings and in my opinion are invalid.

On respondent's appeal to the Court of Appeals for the Fifth Circuit, the orders sustaining the writs were reversed (R. 437-445, 447), one judge dissenting (R. 445-446). The majority found it unnecessary to determine whether the District Court was right when, on December 4, 1948, prior to the taking of final action by the Board of Parole on December 16 revoking the paroles, it ordered petitioners' discharge pursuant to its holding that parolees in custody under violation warrants can successfully challenge on habeas corpus the validity of their detention on a showing that the warrants were issued without information of violations. For the majority, the decisive feature of the case was the Board's taking of that final action of parole-revocation prior to the effective date of the District Court's order of discharge. Upon revocation of the paroles, the parolees were no longer held merely under the warrants alleging parole-violation, but, by virtue of the revocations, under the original commitments themselves. Consequently, the majority thought, after the paroles were revoked, the

question of the legality of the parolees' prior detention under the warrants became, in effect, moot. Upon revocation of parole, as the majority put it, "[t]he warrant has become unimportant" (R. 443). This view of the majority is further reflected in the following passage at the close of their opinion (R. 444-445):

> * * * If a revocation of a parole can ever be attacked collaterally by habeas corpus against the Warden, it ought to be nullified only on plain evidence and a full hearing. The district court here held that the warrant was invalid and that all that followed was void, and did not try at all the Warden's pleading presenting the orders of revocation, but hastily condemned them on the further ground that the hearing was unfair, and released the prisoners from the Warden's custody.
>
> The judgments appealed from are reversed and the appellees are directed to be remanded to the custody of the Warden, with leave to the applicants, if so advised, to enlarge their pleadings so as to present, if they can, a case of total nullity of the orders revoking their paroles under which they are now held.

ARGUMENT

1. We have pointed out that throughout the proceedings in the District Court the Government maintained that habeas corpus to test the legality of petitioners' detention was premature until the Board of Parole took final action by revoking their paroles. The Government's contention was based

on the familiar principle that judicial redress from a supposed injury arising from administrative action, whether by habeas corpus or otherwise, may not be sought until prescribed administrative remedies have been exhausted. See *Macauley* v. *Waterman S. S. Corp.*, 327 U. S. 540, 543-545; *Myers* v. *Bethlehem Corp.*, 303 U. S. 41, 50-52; *United States* v. *Sing Tuck*, 194 U. S. 161, 167-168, 170; cf. *Falbo* v. *United States*, 320 U. S. 549, 553-554; *Estep* v. *United States*, 327 U. S. 114, 123.[12] It is this principle on which is based the well-settled rule in deportation cases that the administrative process must be completed by the issuance of a deportation order before resort may be had to the courts to challenge the legality of any step in the administrative proceedings leading up to the issuance of the order.[13]

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[12] The *Sing Tuck* case involved a habeas corpus proceeding brought by applicants for admission into the country who claimed to be citizens, but who had been ordered excluded as aliens ineligible to enter. Immediately upon being excluded, they commenced habeas corpus proceedings without availing themselves of their right of appeal to the Secretary of the Treasury under the applicable statute. This Court held, however (194 U.S. at 167-168):

"* * * the act * * * points out a mode of procedure which must be followed before there can be a resort to the courts. In order to act at all the executive officer must decide upon the question of citizenship. If his jurisdiction is subject to being upset, still it is necessary that he should proceed if he decides that it exists. An appeal is provided by the statute. The first mode of attacking his decision is by taking that appeal. If the appeal fails it then is time enough to consider whether upon a petition showing probable cause there ought to be a further trial upon *habeas corpus*."

[13] The deportation process begins with the alien's arrest under a warrant charging him with being in the country in

The District Court, in entering its order of December 4, 1948, directing petitioners' discharge from custody, to take effect 15 days thereafter (*supra*, pp. 16-17), rejected this contention. It held that where a parolee, held under a parole-violation warrant, alleges and proves to the court's satisfaction that the warrant was issued without information of violation, he is entitled to be discharged from custody without awaiting final action by the Board of Parole. This is also the view of the Court of Appeals for the Seventh Circuit, which recently held that a demurrer to an allegation in a habeas corpus proceeding that a parole-violation warrant was issued without information of violation was properly overruled. *United States ex rel. DeLucia*

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violation of law. This is followed by a hearing on the charges, the submission of proposed findings and a proposed order, and finally the issuance of the order, or warrant, of deportation. Habeas corpus proceedings challenging the legality of the alien's detention during these proceedings are premature until the administrative process has culminated in the final act—the issuance of the warrant of deportation. *United States ex rel. Zdunic* v. *Uhl*, 144 F. 2d 286 (C.A. 2), affirming 56 F. Supp. 403, 410 (S.D.N.Y.); *United States ex rel. Loucas* v. *Commissioner of Immigration*, 49 F. 2d 473 (S.D.N.Y.); *United States ex rel. Eisler* v. *District Director of Immigration*, 76 F. Supp. 737 (S.D.N.Y.), reversed on other grounds *sub nom. United States ex rel. Doyle* v. *District Director of Im. and Nat.*, 169 F. 2d 753 (C.A. 2); *United States ex rel. Petersen* v. *Commissioner of Immigration*, 1 F. Supp. 735, 736 (S.D.N.Y.); cf. *United States ex rel. Potash* v. *District Director of Im. and Nat.*, 169 F. 2d 747, 752 (C.A. 2); *United States ex rel. Trinler* v. *Carusi*, 166 F. 2d 457, 459-460 (C.A. 3), vacated on other grounds, 168 F. 2d 1014; *Impiriale* v. *Perkins*, 66 F. 2d 805, 806 (C.A.D.C.), certiorari denied, 290 U.S. 690.

v. *O'Donovan*, 178 F. 2d 876.[14] There is, however, no real conflict between the *DeLucia* decision and the decision below. For, as we have pointed out (*supra*, pp. 19-20), the court below did not find it necessary to decide this question. The decision below turned on the circumstance that final administrative action—revocation of the paroles—intervened between the District Court's original order of discharge and the effective date of the order. Upon the occurrence of that event, absent in the *DeLucia* case, petitioners' status was altered. They were then no longer held under warrants charging parole violations, but, in consequence of the revocations, under the original commitments themselves. The court below analogized their new status to that of aliens held under deportation orders, or defendants convicted or held for trial under indictments, whose original arrests may have been in some manner irregular, it being well settled that an irregularity in the mode of arrest is not open to attack in such

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[14] The Seventh Circuit held that the general principle requiring exhaustion of administrative remedies before resort could be had to the courts is inapplicable where the administrative agency "has exceeded its statutory authority" (178 F. 2d at 880), and that, under 18 U.S.C. [1946 ed.] 717, *supra*, pp. 4-5, authorizing the Board of Parole to issue a parole-violation warrant on receipt of "reliable information" of violation, the Board has no authority to issue a warrant where it has no information of violation. The court assumed, for the purposes of the decision, in view of the Government's demurrer, that the Board had no information of parole violation.

cases. See *Albrecht* v. *United States,* 273 U. S. 1; *Bilokumsky* v. *Tod,* 263 U. S. 149, 158; *Stallings* v. *Splain,* 253 U. S. 339, 342-343; *Kelly* v. *Griffin,* 241 U. S. 6, 12-13; *In re Johnson, Petitioner,* 167 U. S. 120, 125-127; *Iasigi* v. *Van DeCarr,* 166 U. S. 391; *Nishimura Ekiu* v. *United States,* 142 U. S. 651, 662. Accordingly, the court thought, the District Court should have granted the Government's motions, based on the intervening revocations and the resulting changed status of petitioners, to reconsider the orders discharging petitioners. The order of reversal and remand did not direct petitioners' restoration to custody in absolute terms, but rather their remand to the Warden's custody "with leave to [petitioners], if so advised, to enlarge their pleadings so as to present, if they can, a case of total nullity of the orders revoking their paroles under which they are now held" (*supra,* p. 20). We submit that petitioners can have no valid objection to this disposition of their case.

2. Section 24-206 of the District of Columbia Code (1940 ed.) provides, in terms substantially identical with 18 U. S. C. [1946 ed.] 719, *supra,* p. 5, that a parolee who has been retaken under a parole-violation warrant "shall be given an opportunity to appear before [the] Board of Indeterminate Sentence and Parole." In *Fleming* v. *Tate,* 156 F. 2d 848 (C. A. D. C.), this statute

was construed as guaranteeing "an effective appearance, and thus necessarily means the presence of counsel if the prisoner so elects, and the receipt of testimony if he has testimony to present" (*id.* at 849). It appears from the court's opinion that "[w]hen Tate was arrested [under the parole-violation warrant], counsel who had theretofore represented him applied for leave to appear in his behalf at the hearing, and Tate's employer requested permission to testify," but that these requests were denied (*ibid.*). Petitioners claim the decision below is in conflict with the *Tate* decision (Pet. 17), since the court below approved the Board of Parole's conduct of the hearings granted petitioners, at which counsel was not permitted to be present (see pp. 11-12, *supra*).

It is true that the court below indicated disagreement with the *Tate* decision (R. 443). However, the opinion below points out what we think is a sound ground of distinction between the two cases. For here, as the majority below pointed out, "The Chairman [of the Board of Parole] by letter offered to let counsel come before the full Board in Washington and present any material or information bearing on the cases, though he declined to have a full scale trial. * * * The Chairman's formal offer to counsel that he appear before the Board in person or in writing and present what he desired, followed by the appearance in person of the

prisoners before two members of the Board who heard and preserved the record of what they had to say, we think is a sufficient opportunity to appear" (R. 443-444). In the *Tate* case, there does not appear to have been any such offer by the Board to Tate's counsel. There is language in the *Tate* opinion which strongly indicates that if there had been such an offer the court would have found that the mandate of the statute had been satisfied. For the court there pointed out that "The statute requires an 'opportunity' to appear, no more. *The participation by counsel in a proceeding such as this need be no greater than is necessary to insure, to the Board as well as to the parolee, that the Board is accurately informed from the parolee's standpoint before it acts, and the permitted presentation of testimony by the parolee need be no greater than is necessary for the same purpose*" [italics supplied] (156 F. 2d at 849-850).

But even assuming, *arguendo*, that the *Tate* decision stands for the broad rule that a parolee is entitled to have counsel present *at the same hearing at which he himself appears* and to present testimony on his behalf *at that time*, so that the Board's offer to counsel in the present case to appear before the Board in Washington and present any relevant material or information on petitioners' behalf would not satisfy the requirements of the statute as construed in the *Tate* decision, we submit that the conflict between the latter decision and

the views expressed below in this regard is not ripe for resolution by this Court. As we have pointed out (*supra*, p. 24), the mandate below is not a final disposition of this case. Petitioners have been ordered remanded to the Warden's custody, "with leave * * * to enlarge their pleadings so as to present, if they can, a case of total nullity of the orders revoking their paroles under which they are now held." If, in the new proceedings in the District Court thus directed, petitioners are successful in establishing the "total nullity" of the parole-revocation orders and are able finally to secure an adjudication that parole-revocation orders are subject to judicial review on habeas corpus (cf. R. 444), their consequent discharge would have the effect of mooting the asserted conflict between the *Tate* decision and the views below criticizing that decision. If, on the other hand, petitioners are unsuccessful they will then have another opportunity to urge the asserted conflict as a ground for this Court's grant of certiorari. But the issuance of certiorari at this time, to review the interlocutory judgment below, would only result in piecemeal disposition of the litigation.[15]

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[15] Petitioners contend (Pet. 98-130) that hearings before the Board of Parole are required to be conducted in accordance with the provisions of the Administrative Procedure Act. However, we think it clear from the provisions of that Act as a whole (60 Stat. 237-244; 5 U.S.C. 1001-1011), and particularly from Section 7(a) of the Act (5 U.S.C. 1006(a)) —providing that "nothing in this Act shall be deemed to

CONCLUSION

There is no real conflict of decisions and no question requiring further review by this Court is presented. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.
JAMES M. MCINERNEY,
Assistant Attorney General.
ROBERT S. ERDAHL,
PHILIP R. MONAHAN,
Attorneys.

MAY 1950.

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supersede the conduct of specified classes of proceedings in whole or in part by or before boards or other officers specially provided for by or designated pursuant to statute"—that the court below was clearly correct in concluding that "[t]he requirements as to procedure in the Administrative Procedure Act have no application to the Parole Board" (R. 443).

Petitioners' final contention (see Pet. 140-145) that they were entitled to litigate in the habeas corpus proceeding below the question of the validity of the original judgments of conviction is, of course, plainly unsound. See 28 U.S.C. 2255, requiring such a contention to be made in the first instance in the court of conviction. This section took effect on September 1, 1948, prior to the commencement of the habeas corpus proceedings.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1949

No. [redacted] 5 [redacted]

LOUIS COMPAGNA and CHARLES GIOE,
Petitioners,

vs.

WILLIAM H. HIATT, Warden, United States Penitentiary, Atlanta, Georgia,
Respondent.

REPLY

TO THE BRIEF FOR THE RESPONDENT IN OPPOSITION

A. WALTON NALL,
22 Marietta St. Bldg.,
Atlanta, Georgia,

WM. SCOTT STEWART,
Chicago Temple,
Chicago 2, Illinois,
Counsel for Petitioners.

BARNARD & MILLER, 33 S. Market St., Chicago 6. FRanklin 2-0562

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1949

No. 536

LOUIS COMPAGNA and CHARLES GIOE,
Petitioners,

vs.

WILLIAM H. HIATT, Warden, United States Penitentiary, Atlanta, Georgia,
Respondent.

REPLY

Companion Case

Shortly after our petition was filed here, in the case at bar, the Solicitor General obtained an order extending the time for Respondent to file a brief in opposition, for the reason that the Government desired to petition for certiorari in *United States ex rel. DeLucia* v. *Donovan*, 178 F. 2nd 876 (Respondent's Brief p. 23). The Solicitor General represented to Mr. Justice Black that it would be desirable to have the two cases considered here together. We agree, and submit that if the Government intends to proceed further in the *DeLucia case*, decision should not be made in the case at bar, until the *DeLucia case* is ready. The

Solicitor General has until June 29th, to file his petition in the *DeLucia case.*[1]

It would be unfortunate for us if your Honors denied certiorari here and learned from the Government petition in the *DeLucia case* that a conflict of decisions exists. In the case at bar we claim that there is a conflict. The Solicitor General asserts that the cases might be distinguished.

Questions Presented

We do not believe that our eleven questions, p. 7 can be fairly boiled down to the one question submitted by the Solicitor General, p. 2.

Administrative Procedure Act

Since our petition was filed here, Your Honors have decided *Wong Yang Sung* v. *McGrath,* 339 U.S. 33, holding that administrative hearings in proceedings for the deportation of aliens must conform to the requirements of the Administrative Procedure Act. The question had been decided both ways in the various circuits. In the case at bar the Solicitor General, p. 27 note 15, urges that the Administrative Procedure Act does not apply. The reasons given are the same as those given in cases overruled by the *Wong Yang Sung case.* Your Honors will remember that, in dissenting, p. 54, Mr. Justice Reed was of the opinion that the exception covers immigrant inspectors. So we assume that the defense now urged, in the case at bar, by the Solicitor General, received careful study in the *Wong case.*

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[1] A second extension was granted by the Chief Justice.

Right to Counsel

The right to counsel is only one of many rights denied these petitioners. The Circuit Court and the Solicitor General say that it is enough that we were invited to Washington. The letter referred to, R. 350, was written on August 6, 1948, by Dr. Killinger to counsel. This letter to counsel was in answer to a letter, R. 348, addressed to the Board on July 26, 1948. At that time the Board refused to disclose the basis of the warrant. The invitation to appear before the Board in Washington and to submit material was of no value. Please see again our petition, p. 41, "Mistakes of Majority as to Facts of Case."

Conclusion

The Solicitor General asserts, p. 27, that our case is not ripe for resolution by this Court—that we should go back to Atlanta and then come up here. If we are correct, if Judge Underwood is right and Judge Waller had the proper view, we have already shown the revocation to be a nullity. In order to make this showing petitioners were required to stay in prison as parole violators. They should not be required to do so again in order to secure an interpretation of the law. The Circuit Court, although requested on petition for rehearing, refused to clarify its mandate. Please see again our petition, p. 137, "The Order of Remand."

We submit that decision here is not only important to these petitioners. Thousands of persons are to be affected. The Parole Board has made a clear cut case by refusing to follow the Administrative Procedure Act, although requested. The public, the prisoners and the Board should know where we all stand. As Your Honors said, in the *Wong case*, p. 41, 45, 47.

> "But it would be a disservice to our form of government and to the administrative process itself if the

courts should fail, so far as the terms of the Act warrant, to give effect to its remedial purposes where the evils it was aimed at appear. * * *

"It is the plain duty of the courts, regardless of their views of the wisdom or policy of the Act to construe this remedial legislation to eliminate so far as its text permits the practices it condemns. *

"The agencies, unlike the aliens, have ready and persuasive access to the legislative ear and if error is made by including them, relief from Congress is a simple matter."

We submit that certiorari should be granted and upon hearing the conclusion by your Honors should be the same as that in the *Wong case,* (substituting Parole Board proceedings for "deportation proceedings") from which we again quote, p. 52:

"We find no basis in the purposes, history or test of this Act for judicially declaring an exemption in favor of deportation proceedings from the procedural safeguards enacted for general application to administrative agencies. We hold that deportation proceedings must conform to the requirements of the Administrative Procedure Act if resulting orders are to have validity. Since the proceeding in the case before us did not comply with these requirements, we sustain the writ of habeas corpus and direct release of the prisoner."

Respectfully submitted,

A. Walton Nall,
Wm. Scott Stewart,
Counsel for Petitioners.